



TRIPLE TALAQ - ITS VOYAGE IN LEGAL SYSTEM AND IMPLICATION OF THE ACT OF 2019 IN INDIA

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ABSTRACT

Triple Talaq, the now considered 'unconstitutional' practice by the Supreme Court of India was one of the social evils prevailing in our country. The discriminatory practice of talaq-e-biddat goes against the provisions of our own Constitution and is unfair to a large extent against Muslim women. If a Muslim man wants to divorce his wife, one of the methods available with him is to pronounce the word talaq three times in a row which is the practice of triple talaq or talaq-e-biddat. Usually followed by Sunni sect, the practice is said to be *sinful but effective*. There is no verse in the holy book of Quran which gives authenticity to triple talaq. Prophet Mohammad condemned the act of triple talaq as playing with the book of God while he was alive. The major Islamic countries like Arab States, Southeast Asian States and Subcontinental States had abolished the practice of talaq-e-biddat long ago by way of legislation but it was still legal in India up till 2019. There have been a plethora of cases filed in the courts for striking down the practice, and finally in the case of Shayara Bano, the practice was declared as unconstitutional. As a result of that The Muslim Women (Protection of Rights on Marriage) Bill, 2019 received the assent of the President on 31st July, 2019.

The Bill makes any kind of declaration of talaq by words or in writing in hand or through electronic form, as void and illegal and not enforceable in law.

Through this research paper, the researchers aim to analyse the voyage of triple talaq as a practice in India till the time it was finally declared unconstitutional in India and the legal implication of the Act of 2019 and would further draw the attention of our readers and legislative authorities towards the drawbacks of the legal provision of the Act.

Keywords: Triple Talaq, Muslim, Islam, Constitution, divorce, unconstitutional.

TALAQ - AN INTRODUCTION

'Of all the lawful things, divorce is the most hated by Allah' - Prophet Mohammad

Divorce, in most societies is a concept which is frowned upon but nonetheless, it is a necessary and inevitable phenomenon in human society. Talaq is the Islamic word for divorce which means termination of marriage. Under Chapter LXV of the Holy Quran states that *"Divorce is only held up twice; after that, the parties can hold up together or proceed with separation."* Justice Krishna Iyer stated that the *"Islamic law is more sinned against than sinning in"*¹The essence of talaq is a unilateral repudiation or cutting off the marital tie.² According to the Sharia sect, there are more ways to terminate a marriage, talaq is one of them. The Hanafi School founded by Abu Hanafi (699- 767 A.D) stated that divorce at the instance of husband is prominent rather than simple.

¹ *Yousuf Rawther v Sowaramma* (1971) AIR 261 (Ker HC). The Court held that a Muslim women has a right to sue for dissolution of marriage, if the husband fails

to maintain her for a cause under the Dissolution of Muslim Marriage Act, 1939.

² David Pearl & Werner Meenski, *Muslim Family Law* (3rd edn 1998) 281 .



*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*³ the Privy Council a century ago ascertained that “the matrimonial law of the Muslim favors the stronger sex like that of every ancient community where the husband can dissolve the marriage arbitrary” and, that “dissolution of marriage by talaq is a whimsical act of husband to renounce his wife at any stage of life at his own pleasure, at any cause”.⁴

Islam, allows ‘*Talaq*’ but only under extraordinary conditions. The provisions for talaq shall be invoked only under highly unfavorable conditions. It must be stressed that divorce in Islam is kept only as a last resort after all the efforts of reconciliation between the spouses are exhausted. Under Islam, marriage is considered as a contract and it has laid down procedures on how to annul it. A woman can seek divorce under what is called ‘*khula*’, while the husband can end the marriage by pronouncing talaq thrice, which is called Talaq-e-Biddat commonly known as triple talaq. Talaq-e-Biddat or instantaneous divorce came into vogue in the second century of Islam. It has two forms:

1. “Triple pronouncement of divorce made in a period of tuhr. On the third pronouncement, the marriage stands dissolved irrevocably.
2. A single pronouncement of divorce irrevocably made in a period of tuhr, or even otherwise. In this form husband may say to his wife, “I divorce thee in talaq-e-biddat form.” The marriage stands dissolved.”⁵

A woman has a right to unilaterally divorce her husband with immediate effect if she has mentioned this clause in her nikahnama, the marital contract. This is also known as talaq-e-Isma. A number of clauses can be put by the woman during the time of her nikah as marriage is considered to be a legal contract under Islamic law. The woman has to specifically invoke this condition in her marital contract to invoke unilateral divorce. However, most of the women are unaware about this condition and do not invoke the same.

Talaq-e-biddat was usually followed and recognized by the Sunni Sect. They believed in the traditional interpretation of talaq-ul-biddat as “*sinful but effective*”. It was based on the proposition in English “*Bad in theology but good in law.*” The irregular mode of talaq was introduced in order to evade the stringency of the law. The talaq pronounced would be irrevocable and the child born after the dissolution of marriage would be illegitimate. The talaq would be considered invalid if it has been invoked by the husband under intoxication, in extreme anger and was not said out of free will and consent or was abnormal or when he cannot differentiate between what is right and wrong. No evidence is required to prove the talaq pronounced by husband, the presence of third person is also not necessary and the wife left with no option to challenge talaq.⁶

BACKGROUND

There is no verse in the Holy Quran which gives authenticity to triple talaq. It has been recognized as a disapproved form of

³ *Moonshee Buzloor Ruheem v Shumsoonnissa Begum* (1867) 11 MIA 551 (610).

⁴ *Moonshee Buzul-Ul-Raheem v Luteefut-Oon-Nissa*, (1861) 8 MIA 397 (395).

⁵ Dr. Paras Diwan, *Family Law* (11th edn., Allahabad Law Agency, 2018) 133.

⁶ *Mohd Umar Khan v Gulshan Begum* (1992) Cri Lj 899 (MP).



termination of marriage. Prophet Mohammad condemned the act of triple talaq as playing with the book of God while he was alive.⁷ The dispute over talaq-e-biddat began during the time of the second Caliph, Hazrat Umar. According to *Sahih Muslim*, 1482 [highly regarded as the undisputed Hadith - Imam Abu Da'ud] during Prophet's and Hazrat Abu Bakr time, three talaqs at one instance were considered as a single pronouncement of talaq.

After Prophet Mohammad, the second Caliph Hazrat Umar gave effect to triple talaq in order to prevent the misuse of the religion. When Arabs conquered Egypt, Persia, Syria and other states, they found that men would divorce their existing wives in order to marry women from Egypt and Syria. The men knew that under Islamic law, divorce is permissible only twice in two separate periods of tuhr, and pronouncing talaq in one sitting is void and un-Islamic. Hence, the men would marry these women and also retain their former wives. Hazrat Umar decreed and allowed the practice of triple talaq irrevocable. It was considered to be a mere administrative measure to meet the emergency situations and not the law. He, later on, reinforced the practice of proper talaq. However, the Hanafi Jurist declared the practice of triple talaq valid.⁸ It is a horrifying precedent.

The Aurangabad Bench of the Bombay High Court in the case of *Dadgu Pathan v. Rahimbi Pathan*⁹ refused to accept the plea of the husband in a case of maintenance and held that the statement of husband of divorcing his wife through triple talaq is not sufficient. The stages in which talaq has to be

preceded and factum of talaq has to be proved before the court. The Court relied upon the words of Quran and held that “*divorcing a wife without a reason just to harm her for protesting against the husband's unlawful demand and divorcing her in sharia law is haram.*”

Halala is practiced by some sects of Sunni Muslims, in order to remarry her previous husband, a female divorcee has to marry someone and after consummation she have to dissolve the marriage. This is a highly inglorious practice by Sunni Muslims which seems unjust and unnatural not only to non-Islamic people but also to followers of Islam. If women fail to do so and go back to their previous husband without nikah halala the children born to them will be illegitimate. Even when Muslim divorcee live with the same husband after triple talaq without consummating her marriage with another person is also considered as a sin and also becomes a taboo.

IMPACT OF THE PRACTICE UPON WOMEN IN INDIA

Muslim women in India used to live in the fear of getting divorced by their husbands anywhere and anytime, orally or through a text message. Living a life where your marriage can be terminated just by the utterance of three words and the constant fear and anxiety attached to it cannot be at all considered dignified. India has the world's third-largest Muslim population in the world which is governed by Sharia or Islamic jurisprudence and this has been the case since British colonial rule. But India's Muslim women faced the threat of a sudden, oral, and

⁷ Tahir Mahmood, *Muslim Law in India and Abroad* (2nd ed. 2016) 132

⁸ Aqil Ahmad, *Mohammedan Law* (2008) 174-175.

⁹ *Dadgu Pathan v Rahimbi Pathan* (2002) 3 MhLJ 602.



out-of-Court divorce. As a matter of fact, countries like Pakistan, Bangladesh and many Islamic countries have already banned the practice years ago but it was still prevalent in India.

The recent practices of talaq being uttered thrice over telephone, e-mail, letters or text messages are rising in number. This innovative mode of divorce is used by the Muslim men without giving any plausible explanation to the wives, as a result wife were left in destitute. Muslim women who are uneducated and cannot provide for themselves, triple talaq served at magnifying their hardships. India being a secular and diverse country, it is important to respect the religious and cultural minorities of all people. However, it is also critically important to ensure that such practices do not abuse basic human rights. Also, it goes against the constitutional principles of gender equality, secularism, and the right to life with dignity. It goes against Article 14 of the Constitution of India which provides the Right to Equality and Article 15(1).

Women were thrown out of home without any reason by their husbands. There is a list of cases that woke the nation to the need for abolition of Triple Talaq. Most Pivotal case was itself the '*Triple Talaq Case*' or '*Shayara Bano Case*' whose petition sparked abolition of Triple Talaq from the country. The case grabbed the whole nation's attention when the Supreme Court admitted her petition and declared Triple Talaq unconstitutional.

The Supreme Court in the very famous case of *Shayara Bano and ors v. Union of India*

*and others*¹⁰ stated that the customs that exist in relation to Muslim marriage seem to generally render women unequal to men, as they are invoked in places where 'the Imam alone, had the authority to resolve a religious conflict, amongst Muslims,'¹¹. Here, women do not enjoy equal access to the ability to renounce their marriage in the manner men do. In such cases custom or practice thus differs from the accepted statutory laws, as the final verdicts are of a 'patriarchal nature, and therefore, cannot be sustained in today's world of gender equality.'¹² The Muslim Personal Law was intended 'to negate the overriding effect on customs and usages over the Muslim 'personal law,'¹³ and should therefore not give rise to contrary practices. Triple talaq is thus in violation of the Indian constitution. Additionally, as India signed several international conventions and declarations prohibiting such acts, the Supreme Court could no longer render triple talaq as an accepted practice. Especially in relation to the inalienable right of equality, the Supreme Court denoted that the failure to remove any form of discrimination against women committed by non-state actors violates 'not only the most basic human rights of women but also violates their civil, economic, social and cultural rights as envisaged in international treaties and covenants.'

TRIPLE TALAQ LAWS IN OTHER COUNTRIES

¹⁰ *Shayara Bano and others v Union of India and others* (22 August 2019) WP(C) No. 118 of 2016 Triple Talaq, para 22-27 (SC).

¹¹ Ibid, para 137.

¹² Ibid, para 122.

¹³ Ibid, para 136.



*'Muslim Law in India and Abroad', by Tahir Mahmood and Saif Mahmood*¹⁴ records about the position of abrogation of talaq-e-biddat practice as a means of divorce, through statutory enactments, world over. The countries were categorized into Arab States, Southeast Asian States and Subcontinental States which have abolished the practice of talaq-e-biddat. The practice was prevalent in sizable Muslim population and later on was removed by way of legislation.

LAWS OF ARAB STATES

The Arab States include Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, United Arab Emirates and Yemen. These countries have enacted legislation to declare talaq-e-biddat void and illegal. Laws of some the countries mentioned below are as follows:

- *Kuwait* declares Islam to be its official religion and Muslims of Sunni sect constitute in majority. Article 109 states that, "If a Talaq is pronounced with a number (two, three) by words, signs or writing, only one Talaq shall take effect."¹⁵
- *Iraq* is a theocratic State which comprises a majority Shia Muslim population. Article 37(1) states that "where a talaq is coupled with a number, express or implied, not more than one divorce shall take place".¹⁶
- *Jordan* consists of majority Sunni sect Muslims and under Article 90 it states that, "A divorce coupled with a number, expressly, or impliedly, as also a divorce

repeated in the same sitting, will not take effect except as a single divorce."¹⁷

- *Sudan* is a theocratic state which declares Islam to be its official religion. Sunni sect constitutes the majority. Article 3 states that " a formula of divorce coupled with a number, expressly or impliedly, shall effect only one divorce."¹⁸
- *Yemen* is a theocratic State which declares Islam to be its official religion and consist of majority Sunni Sect Muslims, under Article 64 states, "a divorce to which a number is attached, whatever be the number, will effect only a single revocable divorce."¹⁹

We observe that the majority of the Arab State laws have declared triple talaq as single pronouncement for divorce where the wife will have to perform the period of iddat. The unilateral divorce by husband gives rise to the right of women to claim maintenance and perform iddat thereafter.

LAWS OF SOUTHEAST ASAIN STATES

The Southeast Asian states include Indonesia, Malaysia and the Philippines.

- *Indonesia* guarantees freedom of religion; however, it recognizes only six official religions including Islam. Sunni sect constitutes the majority. Article 38 states that "a divorce shall be effected only in the Court and the Court shall not permit a divorce before attempting reconciliation between the parties. Divorce shall be permissible only for sufficient reasons indicating breakdown of

¹⁴ *Universal Law Publishing Co. Ltd.*, (2012 edn, New Delhi)

¹⁵ Code of Personal Status 1984, Law 51 of 1984.

¹⁶ Code of Personal Status 1959, Law 188 of 1959 as amended by Law 90 of 1987.

¹⁷ Code of Personal Status 1976, Law 61 of 1976.

¹⁸ Law on Talaq 1935, Judicial Proclamation No.4 of 1935.

¹⁹ Decree on Personal Status 1992, Decree 20 of 1992.



marriage.”²⁰ Divorce by triple talaq is not permissible as there is no attempt for reconciliation.

- *The Constitution of Malaysia* states Islam to be its official religion but other religions are permitted to be practiced. Sunni Sect constitutes the majority. Under Article 47²¹, “the husband can divorce his wife by providing reasons for divorce to the court, thereafter the wife has to perform iddat. prior to the expiry of iddat, no divorce shall be valid.”
- *Philippines* is a secular State and under Muslim Personal Law 1977, under Article 46 states that “any number of repudiations made during one tuhr shall constitute only one repudiation and shall become irrevocable after the expiration of the prescribed iddat.”²² The period of iddat has to be performed by the wife to be divorced irrevocably, the same is not in case of triple talaq.

We observe that divorce in Southeast Asian Countries involve a procedure for divorce and the unilateral pronouncement of talaq will be in effect after the expiration of the period of iddat. The grounds for divorce have to be explicitly stated by the husband before the Court for valid divorce.

LAWS OF SUBCONTINENTAL STATES

The sub continental states include Pakistan, Bangladesh and Sri Lanka. *Pakistan* and *Bangladesh* both constitute of Sunni Sect in majority where Islam is the official religion. “Under section 7, after divorcing the wife, the husband will have to provide a notice to the

Chairman in writing. The Chairman will constitute an Arbitration Council for the purpose of reconciliation between the parties.”²³

The Islam dominated countries have a procedure for divorce and legislation for its implementation. The unilateral and irrevocable divorce does not find its space. In India the legislation was enacted in 2019 after the judgment of the Supreme Court.

DATA

According to a survey conducted by Bhartiya Muslim Mahila Andolan, it was revealed that 95% of the divorced Muslim women did not receive maintenance from their husbands. Out of the divorced women 65.9% were divorced orally, 7.6% were divorced through letters, 3.4% divorced on phone and 0.8% via SMS or Email.

According to the census 2011 Data, out of all the married women 13.5% were married before the age of 15 and 49% were married between the age of 14 to 19 years. Marriages at such an early age decreases the possibility of acquiring a higher level of education and being financially independent. It was observed that reforms in Muslim Personal law have not taken place for over six decades. Muslim women which comprises 8% of the population have been extremely vulnerable due to the fear of triple talaq.

The Protection of Women from Domestic Violence Act 2005, states that the Muslim women had been subjected to the worst kind

²⁰ Law of Marriage 1974, Law 1 of 1974.

²¹ Islamic Family Law Act 1984, Act 304 of 1984.

²² Code of Muslim Personal Law 1977, Decree No.1083 of 1977.

²³ Muslim Family Laws Ordinance 1961, Ordinance VIII of 1961 amended in Bangladesh by Ordinance 114 of 1985.



of cruelty treatment from dowry demands to abandonment, divorce etc.

JUDICIAL PRONOUNCEMENTS ON TRIPLE DIVORCE

Rashid Ahmad v. Anisa Khatun ²⁴

The Privy Council upheld triple divorce to be valid which was pronounced by the husband upon his wife without the knowledge of the wife, despite the fact that the husband and wife cohabitated for 15 years and 5 offspring were born.

Jiauddin Ahmed v. Anwara Begum ²⁵

It was pronounced by single judge bench, Baharul Islam states that talaq-e-biddat pronounced by the husband without any reasonable cause and without any attempts for reconciliation and without the involvement of arbitrators with due representation on behalf of husband and wife would not lead to valid divorce. The High Court awarded maintenance to the wife and concluded that the factum of divorce was not established by the husband by adducing any evidence and hence, the marriage between the parties was subsisting.

Must. Rukia Khatun v. Abdul Khalique Laskar ²⁶

The Division Bench of the Guwahati High Court laid down four essential ingredients for the determination of valid talaq. Firstly, talaq had to be based on good cause, it must not be mere desire, sweet will, whim and caprice of the husband. Secondly, it must not be in secret. Thirdly, there must be a time gap

between pronouncement and finality, so that the desires of the parties can be calmed down and provide a room for reconciliation. Fourthly, there has to be a process of arbitration, where in the arbitrators are the representatives of both husband and wife. If the above ingredients are not fulfilled then talaq is invalid.

Masroor Ahmed v. State (NCT of Delhi) ²⁷

The Delhi High Court held that triple talaq pronounced at the same time is to be treated as single pronouncement of divorce and for severing the marital ties and finally, the husband will have to complete the prescribed procedure for divorce.

Nazeer v. Shemeema ²⁸

The High Court held that practice of talaq-e-biddat was deprecated by the Court. The Court however, called upon the Legislature to codify the law upon the issue as it would result in the advancement of justice as a matter of institutional reform.

Mohd. Ahmed Khan v. ShahBano Begum ²⁹

The Supreme Court in this case held that section 125 of the CrP.C. entitled every divorced wife to approach the Court for maintenance irrespective of their religion. The five-judge bench of the Supreme Court further held that the wife includes unmarried women who have not been re-married and husband is entitled to maintain children born out of the marriage too. The Court made an observation and held that Quran imposes an obligation upon the husband to maintain the wife after divorce without reason, the wife

²⁴ Rashid Ahmad v Anisa Khatun (1932) AIR 25.

²⁵ Jiauddin Ahmed v Anwara Begum (1981) 1 Gau.L.R. 358.

²⁶ Must. Rukia Khatun v Abdul Khalique Laskar (1981) 1 Gau. L.R. 375.

²⁷ Masroor Ahmed v State NCT of Delhi (2008) 103 DRJ 137.

²⁸ Nazeer v Shemeema (2017) 1 KLT 300.

²⁹ Mohd. Ahmed Khan v Shahbano Begum (1985) AIR 954 (SC).



should not be kicked out of home to just die on the streets without a roof.

*Shamim Ara v. State of U.P and Ors.*³⁰

The Supreme Court in a special leave petition held that the liability of the husband shall not end to maintain his wife merely upon the pronouncement of arbitrary triple talaq. There was no evidence regarding the statement of circumstances or proof of reconciliation and presence of witness during the time of talaq. Justice Lahoti emphasized that talaq must be pronounced in support of Quranic injunctions. The term ‘pronounce’ shall not be used as a meaning of a dictionary which denotes “to declare, to proclaim, to articulate and to utter formally.”

*Shayara Bano and ors v. Union of India and others*³¹

On 22nd August 2017, the 5 Judge Bench of the Supreme Court pronounced its decision in the Triple Talaq Case, declaring the practice unconstitutional by a 3:2 majority. Justice Nariman and Justice Lalit gave the majority opinion while Justice Joseph concurred by the majority opinion Chief Justice Kehar for himself and on behalf of Justice Nazeer wrote the minority opinion. While the majority of the judges came to the conclusion that triple talaq is not an essential religious practice, the minority bench found this practice to be an essential religious practice of the religion.

The petitioner, Shayara Bano, was married to Rizwan Ahmad for 15 years. In 2016, he divorced her by pronouncing talaq thrice through a letter. The petition was filed to declare talaq-e-biddat, polygamy and nikah halala to be illegal and unconstitutional as it violates the constitutional freedom guaranteed under Article 14,15,21 and 25. In

³⁰ *Shamim Ara v State of UP and ors* (2002) MANU 0850 (SC).

2015, a suo moto PIL was filed titled ‘*In- Re Muslim Women’s Quest for Equality*’ to examine the arbitrary practice of polygamy, nikah halala and divorce. The Union of India supported the petition. Among the others who intervened in the case were the All India Muslim Personal Law Board and the Jamiat Ulema-e-Hind, who contended that the Court did not have any jurisdiction to entertain a constitutional challenge to Muslim personal law and that the matter was in the domain of the legislature. The Bebaak Collective and the Centre for Study of Society and Secularism were the two organisations working with Muslim women who supported the petition and urged the Court to hold that personal law was subject to the Fundamental Rights.

The argumentation relied on international treaties and covenants to which India is a party, such as the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women and the respective references to gender equality, non-discrimination and human dignity therein. Triple talaq was not in tune with the prevailing social conditions, as Muslim women were vociferously protesting against the practice. Number of theocratic states and countries with large Muslim majorities had prohibited triple talaq and state was interfering with personal laws, leading to the paradox that Muslim women in India had lesser rights as compared to Muslim women in Islamic countries. It was submitted before the Supreme Court that the religious officers such as priests, maulvis, imam propagate and support practices like talaq-e-biddat, nikah

³¹ *Supra* Note No. 9.



halala and polygamy and misuse their position to influence power. These practices subject women's treatment as chattel, thereby violating their fundamental rights and right to live with dignity. The unilateral practice of talaq is not in construction with the modern principles of human rights and gender equality. It does not seek its validity from the Quran. The practice wrecks the lives of divorced women along with children especially the ones belonging from the weaker section of the society.

The counter affidavit filed by the All India Muslim Personal Law Board pleaded before the Court that the Supreme Court does not have any jurisdiction to adjudicate upon the matters of Muslim Personal laws since it is interwoven with the Islamic religion based upon Quranic injunctions. The whole debate was considered to be a battlefield ground for *culture v modernity debate*. Section 2 of the Shariat Act was considered to be the rule of decision as the "dissolution of marriage including talaq, ıla, zihar, lian, khula and mubaraat..." were considered to be a part of private law. The rebuttal of the petitioners' contentions drew on *Narasu Appa Mali*³² and *Ahmedabad Women Action Group*³³ and held that the constitutionality of personal laws could not be tested by the court. It was argued that there was a clear distinction between "laws" and "laws in force" in Article 13 and that it would have to be read along with Article 372, which says that it is mandatory that all laws in force in the territory of India immediately before the commencement of the constitution would continue to remain in force, until they are

altered, repealed or amended by a competent legislature or other competent authority. Triple talaq, could therefore only be interfered with by way of legislation. Other countries, too, had banned triple talaq through legislative acts. It was further opined that triple talaq - a mode of divorce that had been practiced for 1400 years - was part and parcel of the personal law and thus part of the faith of Sunni Muslims belonging to the Hanafi school. The practice was therefore protected under Article 25.

Justices Rohinton Nariman and U.U. Lalit held that *Talaq-e-Biddat* is regulated by the Muslim Personal Law (Shariat) Application Act, 1937. They held the practice is unconstitutional because it is manifestly arbitrary in nature. Justice Kurian Joseph on the other hand, in his concurring opinion, noted that Triple Talaq is against the Quran, and thus lacks legal sanction. He wrote, '*What is held to be bad in the Holy Quran cannot be good in Shariat and, what is bad in theology is bad in law as well*'. The Court held that 'the practice of triple talaq was considered to be arbitrary in nature as the marital bond could be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation to as to save it.' The Court clarified that "*an action is arbitrary must involve negation of equality*" and determined that triple talaq arbitrarily violates article 14.

Notably, the dissenting minority opinion of Chief Justice Khehar and Justice Abdul Nazeer traced the elevation of Personal Law to the status of fundamental rights in the

³² *The State of Bombay v Narasu Appa Mali* (1952) AIR 84 (Bomb HC).

³³ *Maharshi Avadhesh v Union of India* (1994) Suppl (1) SCC 713 and *Ahmedabad Women Action*

Group v Union of India (1997) 3 SCC 573.



Constituent Assembly Debates on Articles 25 and 44. They held that Triple Talaq is not regulated by the Shariat Act of 1937, but is an intrinsic part of personal law. Thus, it is protected by Article 25. Further, the solution to the gender discriminatory practice of *Talaq-e-Biddat* is legislative action and not a challenge to its constitutionality.

The Court tested the constitutionality of triple talaq in various stages. The question the Court has to determine was whether triple talaq has been codified into law by The Muslim Personal Law (Shariat) Application Act, 1937 to subject it to fundamental rights examination. If former was not the case, then the Court would determine whether talaq-e-biddat was part of uncodified personal law and whether such practice could be examined to check its constitutionality. Justices Nariman and Lalit held that the Act of 1937 codified triple talaq under statutory law as it was held that "all forms of talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include triple talaq"³⁴ Hence, it is a part of pre constitutional law under Article 13(1) and would fall under the expression of '*laws in force*.' The Act of 1937 was found to be inconsistent with Part III of the constitution.³⁵ Justices Nazeer, Joseph and Chief Justice Khehar disagreed with the above stated opinion. Justice Joseph stated that the Act of 1937 makes Shariat law applicable as a rule of decision, therefore, while talaq is governed by Shariat, the specific grounds and procedure for talaq have not been codified under the Act.³⁶

The Court had to determine whether talaq-e-biddat was part of uncodified Muslim personal law Justice Joseph answered the question in negative while Justices Khehar and Joseph answered it in affirmation. The Holy Quran permits talaq when there has been previous attempts at reconciliation, however, the same was not possible in talaq-e-biddat and was held to be "against the basic tenets of Holy Quran and consequently, violates Shariat."³⁷ It was held that "merely because a practice has been continued for long, that by itself cannot be made valid if it has been expressly declared impermissible."³⁸ Justices Khehar and Nazeer stated that talaq-e-biddat was a part of uncodified Muslim Personal Law for (Sunni Muslims belonging to Hanafi school) and could not be tested against the constitution were protected from invasion and breach provided under Article 25 of the Constitution.³⁹ The interpretation states the relationship between Article 25 and Articles 14, 15 and 21 as 'other provisions of constitution' to which the freedom of religion under Article 25 is 'subject to.' Article 25 obligates Constitutional Courts to protect the personal laws and not find fault within them. Interference in matters of 'personal law' was beyond judicial examination.⁴⁰

The next consideration for the Court was to determine whether Section 2 of the 1936 Act to which it authorized triple talaq violated provisions of the constitution and was therefore void and unconstitutional. Justices Nariman and Lalit argued that triple talaq was not saved as an "essential religious practice".

³⁴ *Supra*, Note no. 9. para 18.

³⁵ *Ibid*, para 19.

³⁶ *Ibid*, para 4.

³⁷ *Ibid*, para 10.

³⁸ *Ibid*, para 24.

³⁹ *Ibid*, para 143.

⁴⁰ *Ibid*, para 195.



However, Justices Khehar and Nazeer held it to be saved under Article 25 of the constitution. The Justices held that there was no need that “the ball must bounce back to the legislature” and the Court could decide upon the matter. The Supreme Court’s judgment in Ahmedabad Women Action Group⁴¹ was dismissed in the context of having “no ratio” and being contrary in itself. The judges engaged with the core issue of the case with reference to Supreme Court’s jurisprudence in relation to Article 14. The judges held that “legislation can be struck down on the ground of being arbitrary and violative of Article 14 of the constitution”. The “*test of manifest arbitrariness*” was applied since triple talaq was valid without any “*reasonable cause*” and did not allow for “*any attempt at reconciliation between the husband and wife.*” The judges concluded and held that “this form of talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically without any attempt at reconciliation. This form of talaq was held to be violative of Article 14 of the Constitution of India. Therefore, the Act of 1937 which seeks to recognize and enforce talaq within the meaning of expression in laws under Article 13(1) was struck down as being void to the extent it recognizes triple talaq.”⁴² Justices Nariman and Lalit came to the same conclusion via different argumentation and by majority of 3:2 the practice was set aside.

IMPACT OF THE SUPREME COURT’S DECISION

The decision of the Supreme Court was celebrated widely by women rights groups and human rights activists and social justice

⁴¹ Supra note no.33.

⁴² Shayara Bano versus Union of India and Others. - The Indian Supreme Court's Ban of Triple Talaq and

organizations in India. This judgment advanced constitutional values of equality, dignity and secularism. In a limited way, it opened gateways for challenging discriminatory personal laws against the constitutional freedoms. The practice of triple divorce left thousands of women destitute and homeless overnight. The subtext of personal laws regardless of religious practice was that ‘*women are not equal to men*’ was changed through this case. The case was driven by grassroot human activists with women in practice affected by it, which led to galvanization of Muslim community members towards human rights. However, despite setting aside the practice of triple talaq by the honorable Supreme Court and sureness by the All India Muslim Personal Law board, there have been cases reported in several parts of the country on divorce by talaq-e-biddat. As reported, illegalizing triple talaq is not working as Muslim men did not seem to respect the decision of the Court and used arbitrary and selfish moves for divorcing their wives. As suggested by the Supreme Court, the central government should make law on triple talaq within 6 months after the Judgement of Shayara Bano case to penalize the offenders.

Muslim Women (Protection of Rights on Marriage) Act, 2019

The Muslim Women (protection of Rights on Marriage) Bill, 2019 received the assent of the President on 31st July, 2019. The Bill makes any kind of declaration of talaq by words or in writing in hand or through electronic form, as void and illegal and not enforceable in law. The introduction of the

the Debate around Muslim Personal Law and Gender Justice.



Act stated, “*The Act to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected or incidental with it.*”

The Statement of Objects and Reasons of the Act stated that in spite of the Supreme Court setting aside talaq-e-biddat in *Shayara Bano and ors v. Union of India and others*⁴³ and the assurance from AIMPLB, a number of cases had been reported of divorce by way of talaq-e-biddat from different parts of the country. In order to set a deterrent precedent, it felt a need for State action to give effect to the order of the Supreme Court and to redress the grievances of the victim. It stated that the aim of the legislation was to ensure larger Constitutional goals of gender justice and gender equality to married Muslim women and help sub serve their fundamental rights of non-discrimination and empowerment.

Key Provisions of Muslim Women (Protection of Rights on Marriage) Act, 2019

- The Bill makes any kind of declaration of talaq by words or in writing in hand or through electronic form, as void and illegal and not enforceable in law.
- According to the definition provided in the Act, talaq means talaq-e-biddat or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband.⁴⁴

- The Act makes the practice of triple talaq a cognizable offence resulting in upto 3 years’ imprisonment with fine.⁴⁵
- Any victim Muslim woman divorced through triple talaq is entitled to subsistence allowance from her husband for herself and her dependent children.⁴⁶
- A married Muslim woman under the Act is entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate.⁴⁷
- An offence punishable under this Act shall be cognizable and compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine. Bail can be granted only after listening to the woman against whom talaq has been pronounced and after being satisfied that there exist reasonable grounds.⁴⁸

DRAWBACKS AND CRITICISMS OF THE ACT

The Supreme Court has declared the practice of triple talaq unconstitutional and thereafter the Muslim Women (Protection of Rights on Marriage) Act, 2019 was passed. However, the Act is riddled with many internal contradictions. *Firstly*, the law adds unnecessary criminality to a civil matter and the offence is non cognizable. The Supreme Court in the case of Shayara Bano held that the practice of triple talaq is manifestly arbitrary, and therefore, unconstitutional. An act that has no legal consequences being

⁴³WP(C) No. 118 of 2016.

⁴⁴The Muslim Women (Protection of Rights on Marriage) Act 2019 s 2(b).

⁴⁵The Muslim Women (Protection of Rights on Marriage) Act 2019 s 4.

⁴⁶The Muslim Women (Protection of Rights on Marriage) Act 2019 s 5.

⁴⁷The Muslim Women (Protection of Rights on Marriage) Act 2019 s 6.

⁴⁸ The Muslim Women (Protection of Rights on Marriage) Act,2019 s 7.



made a criminal offence, cognizable and non-bailable is manifestly arbitrary and therefore, violative of Article 14. Also, since the Muslim marriage is a civil contract, the procedure to be followed later on its breakdown should also be civil in nature.

Secondly, the penal action to the practice of talaq leaves many other issues unaddressed concerning security and socio-economic and legal issues supporting women. The pronouncement of talaq results in no legal consequences upon the validity of the marriage, such a proclamation leads to desertion by Muslim man. Criminalizing desertion by Muslim men constitutes civil offence for men of all other religions and therefore it is discriminatory under the Constitution.

Thirdly, the term of imprisonment being up to 3 years is arbitrary and excessive. Heinous crimes such as causing death by rash or negligent act, rioting, injuring or defying a place of worship with intent to insult the religion of any class is punishable by two years of imprisonment in jail or fine or both. These criminal acts have a lesser punishment than pronouncing talaq which is arbitrary and violative of Article 14 of the Constitution.

Fourthly and most importantly, during the imprisonment of the husband for three years, there is no properly laid down provision for the woman to seek maintenance for herself and her children for the time served by the husband in jail. The Act provides for subsistence allowance for the women; however, the allowance has not been defined properly and is open to broad interpretation.

Fifthly, the act allows for aggrieved women or any person related by blood or marriage to file a complaint before the Magistrate. There

is no provision regarding the consent of the aggrieved women which has to be seek by the relative before filing of the complaint.

Lastly, Section 5 and 6 of the Act discusses post-divorce issues such as 'subsistence allowance' and the 'custody of her minor child'. It is stated as if her marriage is dissolved by the pronouncement of triple talaq. Here lies a great contradiction in the Act because Section 3 already declares pronouncement of triple talaq as void and Section 5 and 6 discusses post-divorce issues.

CONCLUSION

Finally, after years of struggle, the archaic and medieval practice of triple talaq is finally abolished by the Apex Court of India. This can be considered as a victory of gender justice and relief to the Muslim women. While the law on triple talaq was still a victory, there is a big difference in legislating something and actually affecting change on the ground. As the All India Muslim Personal Law Board had already said the judgment was an interference in Muslim Personal Law, the clergy and orthodox members of society will, without any doubt try and ensure that at least the poorer Muslim women continue to accept the practice and just like always the poorer Muslim women will have to face the oppression; it is only when there is a complaint about a Muslim man giving his wife a triple talaq that some action can be taken against him by the police, but poorer women will, traditionally, have less access to the police or other such avenues to complain about triple talaq. In which case, for the new law to be truly meaningful, NGOs and other social welfare groups will have to educate Muslim women about their rights and be prepared to provide legal and whatever financial support is required to help them get



justice when their husbands try to use the triple talaq route.

The legislation so framed is also a bane rather than boom to the Muslim women in society due to various drawbacks and set backs in the Act. The legislation is loosely drafted and does not adhere to the principles of the Constitution. The practice would be followed if the required amendments have not been made in the Act. The women who suffered the atrocious practice need relief which the Act fails to provide the same and instead also brings criminality to a civil issue.

